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VIA HAND DELIVERY

Honorable Chief Justice and Justices of the California Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: *Karen L. Strauss, et al. v. Mark B. Horton, et al. (S168047)*
[Petition for Writ of Mandate]

To the Honorable Ronald M. George, Chief Justice of California, and the Honorable Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.500(g), amici curiae respectfully submit this letter in support of Petitioners in the above-referenced original writ proceeding. Amici are forty-four members of the California State Legislature, including Senate President Pro Tempore Don Perata, Senate President Pro Tempore-elect Darrell Steinberg, Speaker of the Assembly Karen Bass, Assembly Speaker Emeritus Fabian Nunez, and Senators Ron Calderon, Gilbert Cedillo, Ellen Corbett, Christine Kehoe, Sheila Kuehl, Alan S. Lowenthal, Carole Migden, Alex Padilla, Mark Ridley-Thomas, Gloria Romero, and Patricia Wiggins, and Assemblymembers Jim Beall, Jr., Patty Berg, Julia Brownley, Anna M. Caballero, Charles Calderon, Joe Coto, Kevin de Leon, Mark DeSaulnier, Mike Eng, Noreen Evans, Mike Feuer, Felipe Fuentes, Loni Hancock, Mary Hayashi, Edward P. Hernandez, Jared Huffman, Dave Jones, Betty Karnette, Paul Krekorian, John Laird, Mark Leno, Lloyd E. Levine, Sally J. Lieber, Fiona Ma, Anthony J. Portantino, Lori Saldana, Jose Solorio, Sandre R. Swanson, and Lois Wolk (collectively "the Legislative Amici").

I. STATEMENT OF INTEREST

The issues addressed by this Petition lie at the heart of the state's constitutional structure. Preservation of the delicate constitutional balance among the roles of this Court, the Legislature, and the People through the initiative process is of particular interest to the Legislative Amici

given their role in upholding the constitutional rights of their constituents and participating in any revision of the California Constitution pursuant to article XVIII.

In addition, the Legislative Amici were part of a majority of California legislators that passed the Religious Freedom and Civil Marriage Protection Act, Assembly Bill 43, in the Legislature's 2007-2008 regular session. Assembly Bill 43 recognized the importance of the institution of civil marriage in promoting stable relationships and protecting the civil rights of individuals in those relationships, as well as their children or dependents and members of their extended families. By eliminating gender-specific language limiting marriage to a civil contract between a man and a woman, Assembly Bill 43 intended to extend to same-sex couples the fundamental right of marriage. Simply put, it sought to "end the pernicious practice of marriage discrimination in California." (Assem. Bill No. 43 (2007-2008 Reg. Sess.) § 3(*l*).)

Due to their involvement in the legislative process and their active support of Assembly Bill 43, the Legislative Amici are familiar with the relevant issues, and they support the position and arguments set forth by the Petitioners. As explained below, the Legislative Amici write to urge the Court to preserve fundamental constitutional rights and equal protection of the laws for all Californians from improper revision through the initiative process.

II. SUMMARY OF ARGUMENT

Proposition 8 eviscerates the judicial branch's ability to uphold the fundamental rights of all Californians under the Constitution's equal protection guarantees, and it would preclude the Legislature—who are sworn to uphold the Constitution as the ultimate expression of the will of the People—from exercising their constitutional responsibility to consider an issue of such import. Such a radical revision to the constitutional structure cannot be performed by initiative and is thus invalid.

The protection of minorities from discrimination by the majority is a foundational constitutional principle enshrined in the equal protection clause of California's Constitution. This Court has determined that the equal protection clause prohibits governmental discrimination on the basis of sexual orientation, which extends to the fundamental right of marriage for same-sex couples. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 820, 840-841 (*Marriage Cases*).) This Court's role in the constitutional structure is not only "'to say what the law is,'" (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 469 [quoting *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 177]), but also to preserve these rights from obliteration by the majority.

Proposition 8 seeks to effect a monumental revision of this foundational principle and constitutional structure by allowing a bare majority of voters to eliminate a fundamental right of a constitutionally-protected minority group. If Proposition 8 takes effect, this Court will no longer be the final arbiter of the rights of minorities. Furthermore, treating Proposition 8 as a

mere amendment would divest the Legislature of its constitutional authority to subject such a fundamental abrogation of the equal protection clause to its deliberative processes.

III. ARGUMENT

A. The Court Should Accept Original Jurisdiction Of The Petition

Petitioners have properly invoked the exercise of this Court's original jurisdiction. Original jurisdiction is appropriate when issues presented before this Court are of "great public importance and should be resolved promptly." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 500 (*Eu*) [quoting *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 240 (*Raven*)]; see also Cal. Const., art. VI, § 10; Code Civ. Proc., § 1085; Cal. Rules of Court, rule 8.490.) This Court has traditionally invoked its original jurisdiction in actions challenging ballot initiative measures. (*Eu*, *supra*, 54 Cal.3d at p. 500; *Raven*, *supra*, 52 Cal.3d at p. 336; *Brosnahan v. Brown* (1982) 32 Cal.3d 236; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208 (*Amador*).)

This Petition raises issues of great importance to all Californians. First, the issues addressed lie at the heart of the state's constitutional structure, the separation of powers, and the constitutional roles of this Court, the Legislature, and the initiative process. As discussed in detail below, a prompt resolution is required to clarify and reaffirm our constitutional system of checks and balances, the Court's unique role as final arbiter of equal protection rights, and the Legislature's necessary role in revising the constitution. Second, enforcement of Proposition 8 will eliminate for gays and lesbians the "fundamental constitutional right to marry a person of one's choice." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 789; see also *id.* at p. 809 ["California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution."].) The sudden and abrupt elimination of a fundamental right only for a particular group is undoubtedly an issue of great importance, requiring prompt resolution. Finally, the Petition does not present any questions of fact that the Court must resolve before issuing the relief sought. Accordingly, Legislative Amici submit that exercise of original jurisdiction is proper.

B. The Court's Vital Role In Ensuring Equal Protection Is Improperly Eviscerated By Proposition 8

Californians recognized at the enactment of our Constitution that the protection of minority rights from the majority was (and is) fundamental to the structure of California's constitutional system. These challenges to Proposition 8 are about protection of that framework from unconstitutional encroachment. Proposition 8 improperly seeks to amend the Constitution to deny fundamental rights of equal protection to a disfavored minority. In so doing, it improperly transforms a bare majority into the final adjudicator of equal protection rights for a minority group. But because equal protection is an integral brick in the edifice of our

Constitution, the California Constitution does not authorize such a sweeping denial of fundamental rights by mere amendment. The People and the Constitution of California allow such transformative changes to be enacted only through the process for "revision." Proposition 8 was not enacted through the process of revision; as such, it has unconstitutionally impinged on the province of the judiciary entrusted by the People of California to interpret the fundamental rights granted by the Constitution.

1. The Court Has A Unique Role To Safeguard Equal Protection And Fundamental Rights

In our constitutional system of checks and balances, this Court has a unique role as arbiter of the right to equal protection of the laws that is explicitly guaranteed by the California Constitution, which provides that "[a] person may not be ... denied equal protection of the laws," and "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." (Cal. Const., art. I, § 7, subds. (a)-(b).)

The Legislative Amici submit that the very nature of the guarantee of equal protection requires such a neutral arbiter. As this Court has explained:

> The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. (See Cal. Const., arts. IV, V and VI; The Federalist, Nos. 47, 48 (1788).) Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority.

(*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.)

The Legislative Amici also acknowledge, as this Court has noted, that the judiciary's unique role in preserving these constitutional rights is indispensable: "[b]ecause of its independence and long tenure, the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority." (*Ibid.*)

Similarly, Legislative Amici agree with Justice Kennard's explanation in a concurring opinion in the *Marriage Cases* that by holding that same-sex couples are entitled to the fundamental right to marry:

> this court discharges its gravest and most important responsibility under our constitutional form of government. There is a reason why the words 'Equal Justice Under Law' are inscribed above the

> entrance to the courthouse of the United States Supreme Court. Both the federal and the state Constitutions guarantee to all the 'equal protection of the laws' (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7), and it is the particular responsibility of the judiciary to enforce those guarantees. The architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection.

(*Marriage Cases*, *supra*, 43 Cal.4th at pp. 859-860 (conc. opn. of Kennard, J.).)

Notably, this constitutional mandate exists whether the legislation at issue arose through initiative or through the Legislature. (*Id.* at pp. 849-850.) But the Court's role in guarding equal protection becomes even more vital in the context of an initiative in which a bare majority votes to eviscerate the fundamental rights of an unpopular minority.[1] There is generally a check on the abuse of initiative power to diminish rights, as diminishment of rights for some is often a diminishment of rights for all. But when rights are diminished for, or altogether taken away from, a minority group through initiative, and those rights are not also taken away from the majority, the only recourse is the Court—a neutral body insulated from the pressures that may be brought to bear by a political majority. And, as the City Petitioners so aptly explained, that recourse is eliminated if an initiative unconstitutionally bars the judiciary from exercising its power to interpret the meaning and scope of the right to equal protection in California.

2. Because Proposition 8 Violates The Equal Protection Guarantee And Unfairly Strips Away Fundamental Rights, It Is An Invalid Revision Of The California Constitution

The Legislative Amici submit that while Proposition 8 does not—and cannot—remove this equal protection guarantee from the California Constitution, it nonetheless purports to strike at the heart of this protection. Indeed, as set forth in detail in the Petition, this proposed change seeks to change the "underlying principles" upon which the California Constitution is based and

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[1] This Court has previously recognized and countered attempts to use the initiative process to write discrimination into the California Constitution. For example, this Court struck down an initiative measure that would have repealed legislation prohibiting racial discrimination in housing on equal protection grounds. (*Mulkey v. Reitman* (1966) 64 Cal.2d 529, 542.)

would effect "far reaching changes in the nature of our basic governmental plan." (*Amador*, *supra*, 22 Cal.3d at p. 223.)

Article XVIII of the California Constitution requires that the drastic changes sought via Proposition 8 must be enacted by a revision, not amendment. (Cal. Const., art. XVIII, §§ 2-3; see also *Raven*, *supra*, 52 Cal.3d at p. 349.) A revision to the Constitution requires approval by two-thirds of both houses of the Legislature, and then submission to the voters or a constitutional convention. (Cal. Const., art. XVIII, §§ 2-3.) Indeed, in adopting article XVIII, the People of California made it clear that there is an important and substantive difference between amendment and revision of the Constitution. (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 347.) That vital difference stems from the recognition that "[t]he very term 'constitution' implies an instrument of a permanent and abiding nature. . . ." (*Livermore v. Waite* (1894) 102 Cal. 113, 118 (*Livermore*).)

Here, there can be no dispute that the "permanent and abiding" guarantees of equal protection may not be removed from the Constitution by mere amendment. But Proposition 8 attempts to revise that constitutional guarantee by prohibiting California courts from applying the equal protection guarantees to lesbian and gay couples who wish to exercise the fundamental right to marry. And at its core, in undermining the Court's unique authority to safeguard these constitutional protections, Proposition 8 also disrupts the system of checks and balances mandated by the California Constitution.

This Court has held that laws precluding gays and lesbians from marrying violate the "California Constitution['s] ... guarantee [of] this basic civil right to *all* individuals and couples, without regard to their sexual orientation." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 820.) Indeed, "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." (*Lucas v. Colo. Gen. Assem.* (1964) 377 U.S. 713, 736-737; see also *Jordan v. Silver* (1965) 381 U.S. 415 (conc. opn. of Harlan, J.).) Such an abrogation of equal protection rights would violate the "underlying principles" of the California Constitution and perpetrate "such far reaching changes in the nature of our basic governmental plan as to amount to a revision. . . ." (*Raven*, *supra*, 52 Cal.3d at pp. 354-55; *Amador*, *supra*, 22 Cal. 3d at p. 223.)[2] For that reason, and as explained in greater detail by Petitioners, such changes cannot be effected by mere amendment, and Proposition 8 is invalid.

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[2] The Legislative Amici also agree with the Petitioners in *City and County of San Francisco et al. v. Mark B. Horton, et al. (S168078)* that the 1911 amendment to the California Constitution that begat the initiative process cannot be construed to grant a bare majority of voters the power to undercut the role of the judiciary in matters relating to equal protection. The 1911 amendment was just that—an amendment—and such a radical change to the

[Footnote continued on next page]

3. Proposition 8 Sets A Dangerous Precedent That Threatens More Than Just Marriage Rights For Gays and Lesbians

Even more, allowing voters to deprive same-sex couples of the right to marry would expose other fundamental rights of gay and lesbian people, as well as fundamental rights of other minority groups, to elimination by initiative. As this Court has reminded us, "the traditional, well-established legal rules and practices of our not-so-distant past (1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separate and assertedly equivalent public facilities and institutions as constitutionally equal treatment." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 854.) Just because one may not foresee future instances of discrimination does not mean that they will not occur: "the expansive and protective provisions of our constitutions, such as the due process clause, were drafted with the knowledge that 'times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.'" (*Id.* at p. 854 [quoting *Lawrence v. Texas* (2003) 539 U.S. 558, 579.].)

Thus, to characterize such a violent departure from the well-established function of equal protection as a mere amendment to the Constitution would set a precedent that would be very difficult to distinguish in future cases. Finally, as discussed below, characterization of Proposition 8 as an amendment and not a revision would divest the Legislature of its authority, in accordance with article XVIII, to subject future measures that eliminate fundamental rights of protected minority groups to the legislative process before placing them before the public.

C. Legislative Responsibility Has Been Foreclosed By Proposition 8

In addition to the structural and balance of power concerns enumerated above, Proposition 8 also subverts the procedural mechanisms put into place to protect minorities by the People in enacting the California Constitution. More specifically, the People of California have vested the authority to revise the California Constitution initially in the Legislature. (Cal. Const., art. XVIII, §§ 2-3; *Raven*, *supra*, 52 Cal.3d at p. 349.) The People reserved this right of revision to the Legislature because the types of changes available through a revision "require more formality, discussion, and deliberation than is available through the initiative process." (*Eu*, *supra*, 54 Cal.3d at p. 506; *Raven*, *supra*, 52 Cal.3d at p. 350.) The "formality" of legislative debate, deliberation, and super-majority vote is necessary to protect the rights of minority groups and safeguard the role of the Legislature in representing the People. Simply put, a fundamental change to California's Constitution must be subject to the formalities of legislative review required for enacting a constitutional revision. These procedural safeguards ensure that all

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[Footnote continued from previous page]
underlying principles of the California Constitution would have had to be effected through a revision.

Californians, whether in the majority or minority, continue to enjoy the guarantee of the Constitution's protections of their basic civil rights.

As a revision masquerading as an amendment, Proposition 8 intrudes on the vital role of the Legislature in vetting revisions to the California Constitution and side-steps the rigors of the legislative process. (Cal. Const., art. XVIII; *Raven*, *supra*, 52 Cal.3d at p. 349.) The Legislature is specially suited to examine and debate constitutional issues, and the legislative forum is structured for precisely such a task. Allowing Proposition 8 to by-pass the legislative process subverts the will of the People by eliminating the constitutionally-mandated role of the Legislature in the constitutional revision process.

Like this Court, the Legislative Amici regard the California Constitution as "the ultimate expression of the people's will." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 852.) Further, in their oath of office as members of the California Legislature, the Legislative Amici swore to protect and defend the Constitution of the State of California. (Cal. Const., art. XX.) Thus, in supporting the Petition before this Court, the Legislative Amici seek to carry out their sworn duty to defend the Constitution, uphold their own role in protecting the constitutional guarantee of equal protection, and protect the People's will from infringement by Proposition 8.

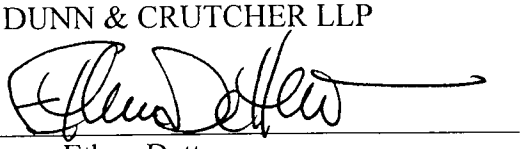
Indeed, the citizens of California rely on the Legislature and the courts to safeguard against unlawful discrimination by temporary, and often short-lived, majorities. Our State's few deviations from this duty have proven, with the perspective of historical distance, to be the most abhorrent chapters in our State's history. We recall shamefully, for instance, the state-sponsored oppression of Californians of Chinese, Japanese, and African American heritage, as well as women in California. The Legislative Amici urge this Court to prevent the momentary passions of a bare majority from compromising the enduring constitutional promise of equal protection under the law. Proposition 8's radical change to our constitutional protections cannot be considered a mere "amendment." The California Constitution—"the ultimate expression of the people's will"—requires the involvement of the Legislature in a constitutional revision of this magnitude. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 852.)

IV. CONCLUSION

For the foregoing reasons, Legislative Amici respectfully urge this Court to grant the relief sought in the Petition for Writ of Mandate.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
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DECLARATION OF SERVICE

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AMICI CURIAE LETTER IN SUPPORT OF PETITION FOR WRIT OF MANDATE FILED BY KAREN L. STRAUSS (STRAUSS, ET AL. v. HORTON, ET AL.)

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Robin McBain

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